



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107342/2023

Held in Chambers on 18 April 2024

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Employment Judge A Jones

Mr G Crawley

**Claimant
Represented by:
Ms J Stewart -
Wife**

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Unison

**Respondent
Represented by
Mr C Harrington -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant is ordered to pay to the respondent the sum of £1500 in respect of the legal expenses incurred by them in defending the claims brought by the claimant.

REASONS

1. The claimant submitted a claim on 13 December 2023 alleging that the respondent had failed to pay him in lieu of annual leave to which he said he was entitled between his suspension from work in July 2020 and his resignation in August 2023. He also claimed that the respondent had failed to pay him in lieu of additional hours he had worked in 2020, in respect of which he said he was entitled to take time off in lieu.
2. A judgment was promulgated on 5 March 2024 dismissing the claims. The respondent made an application for expenses on 11 March. The application was made on the basis that the claimant's claims did not have any reasonable prospects of success and/or that his conduct was vexatious or otherwise unreasonable. A schedule of the expenses incurred was provided which amounted to £8496.00 including vat.

3. The claimant responded by email on 13 March setting out the basis of his objection to an award of expenses being made. On that date, the claimant also indicated that he was content for the matter to be determined without a hearing. The claimant subsequently provided information in relation to his income. The claimant is now retired and receives a pension of around £1500 per month. He has no savings.
4. The Tribunal wrote to parties on 13 March indicating that if the matter was to be determined without a hearing, then any further representations should be provided no later than 27 March.
5. The respondent provided comment on the claimant's objection to the award of expenses in an email of 26 March. The respondent also confirmed that it was content for the matter to be dealt with in chambers.
6. The claimant provided further submissions in an email of 27 March.
7. Parties were informed that the matter would be considered by the Employment Judge on the basis of the written representations.

Relevant law

8. Rule 76 Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 sets out when and order for expenses may be made and rule 78 sets out the amount of an award which might be made.
9. As was highlighted by the Court of Appeal in **Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR** an award of expenses is an exception and not the rule in employment cases. In that case the court also cautioned that in determining whether or not to exercise its discretion to award expenses the Tribunal should look at the whole picture of what happened in the case and consider whether there was any unreasonable conduct on the part of a claim and if so, what that conduct was and what effect it had.
10. A Tribunal should also take into account when determining whether to exercise its discretion that the purpose of any award is to compensate the

party in whose favour the award is made not to punish the party against whom the award is made.

- 5 11. In addition, it is open to a Tribunal to have regard to the ability of a party to pay any award although a Tribunal is not obliged to take this into account (Rule 84).
12. Finally, a Tribunal has wide discretion to make an award of expenses but should ensure that it takes into account only relevant matters in exercising that discretion.

Discussion and decision

- 10 13. In the present case, the Tribunal has taken into account the following matters.
14. The claimant was not legally represented in these proceedings, but both he and his wife who latterly represented him were very experienced officers of the respondent Trade Union. While the claimant's position was that he did not provide legal advice to members or represent them, he did have knowledge of significant issues such as Working Time provisions.
- 15 15. The Tribunal did not accept as credible the claimant's position that he understood that his claim would have been struck out by the Tribunal at an early stage if it did not have merit.
16. The claimant had submitted two claims, one for holiday pay and one which related to an allegation that he should have received payment for additional hours he said he had worked in 2020.
- 20 17. There had been no preliminary hearings in this case. However the respondent had made requests of the claimant to clarify his claim in its grounds of response on a number of occasions, and reiterated what it perceived to be the flaws in the claimant's claims in a letter to the claimant of 26 January. The respondent had made an offer to the claimant in the letter of 26 January that if he withdrew his claims no application for expenses would be made. The claimant was therefore aware of the respondent's intention to make an application for expenses from that time.
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18. The claimant's response to the respondent's letter of 26 January was to write to the Tribunal and not copy the respondent indicating that he was being asked for information from the respondent and 'basically my whole case just now rather than tell all this to the judge, but I haven't been sent an order from yourselves to do that, to give them all this detail.' The claimant was referred to ACAS by the Tribunal administration and it was suggested that he may wish to seek advice on the matter. The claimant also wrote to the respondent indicating that it "is for the Tribunal to judge at the hearing" whether the claims were without merit. The respondent had provided a detailed analysis of why it was said that the claims were without merit.
19. The respondent's agent and claimant exchanged further correspondence in which the respondent continued to assert that the claimant's claim was not specified and was without merit.
20. The Tribunal is of the view that the claimant's application for payment in respect of additional hours he said he worked in 2020, was hopeless and entirely speculative. In addition, the claimant was asked at the commencement of the Tribunal hearing whether he wished to persist with that complaint given that he was unable to provide any evidence regarding a contractual basis for the claim. After an adjournment, the claimant's representative indicated that the claimant wished to proceed with the case, although the Tribunal noted that the claimant appeared to be suggesting he did not want to proceed. The claimant's representative indicated that 'not much would be made of it.' The claimant's position appeared therefore to be that he accepted the claim had no merit but that he would proceed with it nonetheless. That amounted to unreasonable conduct.
21. Taking these factors into account the Tribunal concluded that the claimant's conduct in persisting with his application in particular in relation to unpaid wages relating to 2020 was unreasonable conduct. The claimant was aware that he had no evidence whatsoever to substantiate any such claim and had not set out any legal basis for a claim. These matters had all been highlighted to the claimant on a number of occasions by the respondent and the claimant

had been warned that the respondent might seek to recover its expenses, yet persisted with his claims.

22. Therefore even if it could be said that the claimant's claim relating to holiday might at least have been clarified to some extent, the claim relating to being paid for additional accrued hours some 3 years prior to his resignation was wholly without merit.
23. The Tribunal has also taken into account that the claimant has no savings and a pension of around £1500 per month.
24. The Tribunal concluded that the claimant's claim in relation a payment for time off in lieu was hopeless and had no reasonable prospects of success and that the claimant's conduct in persisting with that claim in circumstances, where he acknowledged that 'not much would be made of it', was unreasonable conduct.
25. In these circumstances, the Tribunal is of the view that it would be appropriate for the claimant to be required to pay to the respondent an element of the legal expenses incurred by it in defending the claimant's claims. The Tribunal is of the view that it would be appropriate to order the claimant to pay to the respondent the sum of £1500 towards the expenses incurred by it in defending these proceedings.

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A Jones

Employment Judge

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19 April 2024**Date****Date sent to parties****24 April 2024**

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